No. ____-_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JESS WESLEY CRAWFORD; DIANE LA PLANTE; and RODNEY LANE,

Respondents,

vs.

GENUINE PARTS CO., INC., a Georgia corporation; and ECHLIN INC., formerly ECHLIN MANUFACTURING COMPANY, a Connecticut corporation,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether principles of comity and tribal court sovereignty require federal court dismissal or abstention in a product liability case initially brought by Indian plaintiffs in state court against non-Indian defendants and removed to federal court by the non-Indian defendants based upon diversity of citizenship, where: (a) defendants did not engage in any consensual relationship, commercial dealing, contract, or other arrangement with the tribe or its members; (b) defendants' alleged conduct did not threaten or have any direct effect on the political integrity, economic security, or health or welfare of the tribe as a whole; and (c) all transactions involved, except for the accident itself, occurred outside the boundaries of the Indian reservation.

2. Whether a federal district court has any discretion not to defer to a tribal court for exhaustion of tribal remedies under such circumstances, especially when the Indian plaintiffs failed to assert tribal court jurisdiction until 23 days before trial in a case pending more than four years in the state and federal courts.

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OPINIONS BELOW

On May 8, 1990, The Honorable Paul G. Hatfield, Chief Judge of the United States District Court for the District of Montana, Great Falls Division, entered a Memorandum and Order denying plaintiffs/respondents' motion to stay the district court proceedings and to transfer their cases to Blackfeet Tribal Court.[1] *Crawford v. Genuine Parts Co.*, 737 F. Supp. 1121 (D. Mont. 1990). The Memorandum and Order has been reproduced as Appendix B, pages 1b-15b. On May 16, 1990, Judge Hatfield entered an order amending the May 8, 1990 Memorandum and Order to include the statement prescribed by 28 U.S.C. § 1292(b), certifying an immediate appeal. The May 16, 1990 Order has been reproduced as Appendix C, pages 1c-3c.

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[1]Plaintiffs/respondents Jess Wesley Crawford, Diane LaPlante, and Rodney Lane, are all enrolled members of the Blackfeet Indian Tribe and are citizens of Montana. Defendants/petitioners are Genuine Parts Co., Inc., a Georgia corporation whose principal place of business is in Georgia, and Echlin, Inc., a Connecticut corporation whose principal place of business is in Connecticut. Genuine Parts Co. is the majority owner of Belkamp, Inc., an Indiana corporation. Echlin, Inc. has as nonwholly owned subsidiaries BWD Automotive of Puerto Rico, Inc., a Puerto Rico corporation; Echlin Charger Mfg. Co. (Pty.) Ltd., a South Africa corporation; and Echlin de Venezuela, C.A., a Venezuela corporation.

On June 27, 1990, the Court of Appeals for the Ninth Court granted plaintiffs/respondents' petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). On October 31, 1991, the Ninth Circuit filed its opinion reversing the district court's order and remanding for the district court to dismiss or abstain in favor of tribal court proceedings. *Crawford v. Genuine Parts Co., Inc.*, No. 90-35488, slip op. 14957 (9th Cir. Oct. 31, 1991), 1991 WL 218606, 1991 U.S. App. LEXIS 25513, 91 Daily Journal DAR 13457. A copy of the Ninth Circuit opinion is attached as Appendix A, pages 1a-8a.

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was filed October 31, 1991. No motion for rehearing was made. On December 3, 1991, the Ninth Circuit granted petitioners' motion for a 30-day stay of mandate pending application to this court for a writ of certiorari. Pursuant to 28 U.S.C. § 2101(c) and Rule 13.1 of the Supreme Court Rules, the petition for writ of certiorari is timely filed, having been filed within 90 days of the entry of the judgment of the Ninth Circuit. Jurisdiction is conferred on this court by 28 U.S.C. § 1254(1).

RELEVANT TREATIES, STATUTES, AND REGULATIONS

28 U.S.C. § 1441, the removal statute, and 28 U.S.C. § 1332 (as amended October 21, 1976), the diversity jurisdiction statute, are set forth in full in Appendix D.

STATEMENT OF THE CASE

A. Factual Background.

On December 20, 1982, plaintiffs/respondents, Jess Crawford, Diane LaPlante, and Rodney Lane, all members of the Blackfeet Indian Tribe, were injured in a one vehicle accident on U.S. Highway 89, at a location within the exterior boundaries of the Blackfeet Indian Reservation. Respondents were in Crawford's 1968 Ford Bronco, when Lane, the driver, allegedly took evasive action to avoid horses on the highway, and the Bronco overturned.

Crawford had purchased the Ford Bronco on November 26, 1982, from a used car dealer in Coram, Montana, located outside the reservation boundaries. The person who had previously owned and traded the vehicle to the used car dealer had purchased and installed on the Bronco a master cylinder rebuild kit manufactured and distributed by defendants/petitioners Genuine Parts Co., Inc., and Echlin, Inc. Both Genuine Parts and Echlin are incorporated and have their principal places of business in states other than Montana. As noted by the district court:

> Both Genuine Parts Company and Echlin, Inc., have their principal places of business in states other than Montana. The master cylinder rebuild kit at issue was manufactured outside the State of Montana and was sold at a retail outlet in Columbia Falls,

> Montana; a location outside the boundaries of the Blackfeet Indian Reservation. Installation of the master cylinder kit in the Crawford vehicle, as well as Crawford's purchase of the vehicle, occurred at locations outside the reservation boundaries. In sum, *with the exception of the mishap itself, all transactions relating to the plaintiffs' causes of action occurred outside the boundaries of the Blackfeet Indian Reservation.*

Crawford, 737 F. Supp. at 1123, Appendix B at page 4b-5b (emphasis added).

B. Procedural Background.

On July 13, 1984, plaintiff/respondent Jess Crawford filed suit in the District Court of the Eighth Judicial District for the State of Montana. Crawford alleged several theories of liability against multiple defendants, including a strict products liability theory against defendants/petitioners Genuine Parts and Echlin.[2] On September 25, 1984, plaintiffs/respondents Diane LaPlante and Rodney

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[2]Crawford alleged that the cause of the accident was a braking system failure in the vehicle. He originally sued not only Genuine Parts and Echlin, who manufactured and/or marketed the master cylinder rebuild kit installed on the vehicle by the previous owner, but also the used car dealership from which he purchased the vehicle, and the brake repair shop which had serviced the brake system on December 8, 1982.

Lane, filed a joint complaint in the District Court of the Eighth Judicial District of the State of Montana, making essentially the same allegations as those in Crawford's complaint.

Approximately two years later, plaintiffs effected settlements with and voluntarily dismissed from the state court actions all defendants except Genuine Parts and Echlin. Because all non-diverse defendants had been dismissed, defendants Genuine Parts and Echlin removed both actions to the United States District Court for the District of Montana, Great Falls Division, pursuant to 28 U.S.C. § 1441. Jurisdiction in the United States District Court for the District of Montana was vested pursuant to 28 U.S.C. § 1332, as the actions were civil actions between citizens of different states with the amount in controversy exceeding $10,000 exclusive of interest and costs.

On April 10, 1989, over two years after the actions were removed to federal district court, and only twenty-three days before the scheduled trial date, plaintiffs moved to stay the federal district court proceedings until they could institute identical proceedings in Blackfeet Tribal Court. On May 8, 1990, the federal district court entered its Memorandum and Order denying plaintiffs' motion to stay proceedings and to transfer the actions to tribal court, concluding that:

> Considerations of wise judicial administration compel the court to hold that the failure of the plaintiffs to seasonably avail themselves of the opportunity to adjudicate this controversy in the Blackfeet Tribal Court

> precludes them from invoking the "exhaustion rule". This court need not stay its hand at this juncture. The federal courts' "virtually unflagging obligation" to exercise the jurisdiction given them, *England v. Medical Examiners*, 375 U.S. 411, 415 (1964), need not yield under the circumstances of this case.

Crawford, 737 F. Supp. at 1127, Appendix B at page 15b.

On October 31, 1991, having granted plaintiffs' petition for permission to appeal under 28 U.S.C. § 1292(b), the Court of Appeals for the Ninth Circuit reversed and remanded the case for the district court to dismiss or abstain in favor of tribal court proceedings. Having concluded that the dispute was a "reservation affair," given the situs of the harm on a reservation and the presence of Indian parties, the Ninth Circuit held that the district court had "no discretion not to defer," absent the applicability of one of three exceptions cited in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985). *Crawford*, slip op. at 14963; Appendix A at page 7a. The Ninth Circuit so held even though it found the district court's reasoning "compelling." *Id.*

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that the petition for writ of certiorari should be granted under Rule 10(c) of the Supreme Court Rules because the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

First, although recognizing that "mandatory deference does not follow automatically from an assertion of tribal court jurisdiction," and that "deference to tribal courts is not required when the disputed issue is not a 'reservation affair' or did not 'ar[i]se on the reservation,'" the Ninth Circuit nonetheless concluded that deference was mandatory, not discretionary, in this case. *Crawford,* slip op. at 14961-63, Appendix A at page 5a-7a. It did so even though the defendants had not entered the reservation or engaged in any commercial dealing or other consensual arrangement with the tribe or its members, the defendants' conduct did not threaten or have any direct effect on the political integrity, economic security, or health or welfare of the tribe as a whole, and all transactions at issue, except for the accident itself, occurred outside reservation boundaries. Neither *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985), nor *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987), the exhaustion rule decisions from this Court, presented the question whether exhaustion of tribal court remedies was required when a civil dispute between Indian plaintiffs and non-Indian defendants involved such significant off-reservation activities so far removed from reservation interests as the dispute at issue here.

Second, while finding the district court's reasoning concerning the untimeliness of the Indian plaintiffs' assertion of tribal court jurisdiction "compelling," the Ninth Circuit nonetheless held that the district court had "no discretion not to defer" under *National Farmers Union* and *LaPlante* absent an assertion of tribal court jurisdiction which fell within one of the exceptions to the exhaustion rule articulated in *National Farmers Union,* 471 U.S. at

856 n.21. *Crawford,* slip op. at 14963, Appendix A at page 7a. The exhaustion rule decisions from this Court to date, however, have not squarely presented the unusual procedural posture, "considerations of wise judicial administration," and untimely assertion of tribal court jurisdiction which in this case persuaded the district court that deference to the tribal court was unnecessary.

Contrary to the Ninth Circuit's conclusion, neither deference to the tribal court nor exhaustion of tribal remedies on the facts of this case is mandated by decisions of this Court either enunciating the exhaustion rule, interpreting the extent of retained tribal sovereignty, or elucidating general principles of federal court abstention in favor of non-federal proceedings.

A. Contrary to the Ninth Circuit's Conclusion, this Case is Not Sufficiently Tied to Reservation Interests to Warrant Invoking the Exhaustion Rule to Prevent the Federal District Court from Reaching the Merits of a Controversy Over Which It, Like the State Court from Which the Controversy Was Removed, Had Jurisdiction.

This Court first announced the exhaustion of tribal remedies rule in *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985), a paradigm case in which non-Indian plaintiffs in federal district court sought to enjoin tribal court proceedings pending against them. In *National Farmers Union,* a tribal member had obtained a default judgment in tribal court against a school district for injuries sustained in an automobile accident occurring on

school district property located within the exterior boundaries of the Crow Reservation. When the school district's insurer learned of the default judgment, it brought an action in federal district court to enjoin against execution of the tribal court judgment. The district court granted the injunction on grounds that the tribal court lacked subject matter jurisdiction over the tort that was the basis of the default judgment. The Ninth Circuit reversed, concluding that the district court's exercise of jurisdiction was not supportable on any constitutional, statutory, or common law ground.

This Court reversed, holding that the district court had federal question jurisdiction to decide a claim that a tribal court had exceeded its jurisdiction, but that exhaustion of tribal court remedies was required before the federal court addressed the question of tribal jurisdiction. This Court reasoned:

> Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically forclosed, as an extension of Oliphant [v. Suquamish Indian Tribe, 435 U.S. 191 (1978)] would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and

> elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself.

471 U.S. at 855-56 (footnotes omitted). Thus, this Court concluded that proper respect for tribal sovereignty and tribal courts required the federal court to allow the tribal courts a full opportunity to consider the factual and legal bases for the challenge to tribal jurisdiction and to rectify any errors. 471 U.S. at 856-57.

This Court also recognized, however, that exhaustion would not be required in every case where tribal court jurisdiction was asserted, stating:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

471 U.S. at 856 n.21 (citations omitted).

In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), this Court again considered and expanded the exhaustion rule. In *LaPlante*, a Blackfeet tribal member

employed on a ranch owned by other tribal members and located on the reservation sued the ranch and its owners in Blackfeet Tribal Court for injuries sustained when the cattle truck he was driving on the reservation jack-knifed. He also sued the ranch and the ranch owners' insurer for bad faith refusal to settle. The insurer moved to dismiss for lack of subject matter jurisdiction. The tribal court held that it had jurisdiction, because the insurer had engaged in commercial relations with Indians on the reservation.

The insurer then filed suit in federal district court, based on diversity jurisdiction, against the plaintiffs and co-defendants in the tribal court action, seeking a declaration that it lacked coverage and had no duty to indemnify, an affirmative defense it had asserted in the tribal court action. The district court dismissed the case holding that its jurisdiction was precluded because, in a diversity case, it operated solely as an adjunct of the state court system which lacked jurisdiction over comparable suits and, thus, it could entertain the case only if the tribal court declined to exercise its exclusive jurisdiction. The district court also held that the tribal court must first be given the opportunity to determine its own jurisdiction. The Ninth Circuit affirmed.

This Court held that the federal court did have concurrent jurisdiction with the tribal court based on diversity of citizenship, but extended the exhaustion rule to preclude federal court adjudication of a dispute pending in the tribal court. In so doing, the Court noted the federal government's "long standing policy of encouraging tribal self-government," which "reflects the fact that Indian tribes

retain 'attributes of sovereignty over both their members and their territory,' . . . to the extent that sovereignty has not been withdrawn by federal statute or treaty." 480 U.S. at 14. This Court then explained:

> The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." . . .
>
> Tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, . . . their civil jurisdiction is not similarly restricted. . . . If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. . . .
>
> The federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts, as we recognized in National Farmers Union. . . .

> Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in National Farmers Union applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." . . . In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. . . . Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.
>
> As National Farmers Union indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors."

480 U.S. at 14-16.

Underlying this Court's decisions in both *National Farmers Union* and *LaPlante* was the long-standing federal policy recognizing the role of tribal courts in preserving tribal sovereignty. The exhaustion requirement served to

ensure that the tribal court could protect its own jurisdiction, "thereby promoting the tribe's 'authority over reservation affairs' and preventing infringement upon tribal lawmaking authority." *Stock West Corp. v. Taylor*, 942 F.2d 655, 660 (9th Cir. 1991) ("*Stock West II*") (*citing LaPlante*, 480 U.S. at 16). In both *National Farmers Union* and *LaPlante*, the litigation involved events occurring wholly on the reservation, as well as claims in tribal court against non-Indian defendants who had either entered the reservation or had engaged in contracts or other consensual arrangements with tribal members.[3] Thus, both cases truly involved reservation affairs in which the federal courts' exercise of jurisdiction without exhaustion of tribal remedies placed the federal courts in direct competition with tribal courts in which the actions were

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[3]Similarly, court of appeal cases invoking the exhaustion rule have involved truly reservation affairs--disputes arising out of non-Indians' activities on the reservation or consensual relationships with the tribe and/or involving tribal governmental matters. *See, e.g., A&A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411 (9th Cir.), *cert. denied*, 476 U.S. 1117 (1986); *Brown v. Washoe Housing Authority*, 835 F.2d 1327 (10th Cir. 1988), *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987); *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir. 1989); *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273 (8th Cir. 1987); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986).

already pending, thereby directly infringing on tribal sovereignty.

However, as the Ninth Circuit recognized in *Stock West II*, 942 F.2d at 660:

> [T]he exhaustion requirement cannot be absolute whenever tribal court jurisdiction is asserted. Where the civil action involves non-Indian parties, concerns incidents which occurred off of the reservation, and will not impact the tribe's authority, there is little reason to require that the tribal court have first crack at the case. A federal court's decision to defer to the tribal courts does not come without costs, because the party that chose to pursue its cause of action in federal court is deprived of an adjudication by the forum of choice unless the tribal court has no jurisdiction. . . . Where the tribe has little or no interest in the matter, there is no justification for imposing this cost upon the litigant.

Stock West II, 942 F.2d at 660. Thus, the Ninth Circuit recognized that "a federal court must examine the circumstances of the individual case in order to determine if deference is necessary, in light of the purposes of the exhaustion requirement." *Id.* at 661. *See also, Burlington Northern v. Crow Tribe Council*, 940 F.2d at 1245-46 (examining whether exhaustion must be mandatory by considering tribal self-government concerns, judicial effi-

ciency and the tribal court's expertise in interpreting novel areas of tribal law).

The Ninth Circuit's conclusion in *Stock West II* was amply supported, not only by the factual underpinnings and rationale of this Court's decisions in *National Farmers Union* and *LaPlante*, but also by this Court's decisions recognizing the divestiture of a tribe's inherent sovereignty and limitations on its ability to exercise jurisdiction over nonmembers which result from the tribe's dependent status. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 326 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989); *Duro v. Reina*, 495 U.S. 676 (1990).

As this Court recognized in *Wheeler*, 435 U.S. at 326, the tribe's inherent sovereignty is implicitly divested to the extent it is inconsistent with the tribe's dependent status. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.*

Furthermore, this Court, in *Montana*, 450 U.S. at 564, recognized the general principle that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsis-

tent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Recognizing that the Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), only determined that the tribes were divested of inherent sovereign authority to exercise criminal jurisdiction over non-Indians, the *Montana* Court further elucidated the limits on tribal sovereignty and jurisdiction over nonmembers, stating:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. The tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .

450 U.S. at 565-66 (citations omitted). *See also, Merrion*, 455 U.S. at 142 ("a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe."); *Brendale v. Confederated Yakima Nation*, 492 U.S. at 425-28 (reiterating the limitations on a tribe's inherent sovereignty expressed in *Mon-*

tana); *Duro v. Reina*, 495 U.S. 676, 109 L. Ed. 2d 693, 705 (1990) (reiterating the principles articulated in *Montana* concerning limitations upon tribal civil jurisdiction).

When the circumstances of this case are examined in light of these limitations on tribal sovereignty and on civil jurisdiction over non-members of the tribe, and with regard to the purposes of the exhaustion requirement, this case is not sufficiently tied to reservation interests to warrant invocation of the exhaustion rule. Although the Ninth Circuit correctly recognized that mandatory deference does not follow automatically from an assertion of tribal court jurisdiction and is not required when the dispute does not involve a "reservation affair," the Ninth Circuit erroneously concluded that the dispute at issue here involved a reservation affair.

This is not a case where the defendant brake companies entered the reservation, engaged in any commercial dealing or other consensual arrangement with the tribe or its members, or engaged in conduct which threatened or had any direct effect on the political integrity, the economic security, or the health or welfare of the tribe as a whole. As the district court noted, all transactions at issue in this case, except for the occurrence of the accident itself, occurred outside reservation boundaries. Because this case involves such significant off-reservation activities far removed from reservation interests, the exhaustion rule

announced in *National Farmers Union* and *LaPlante* should not apply.[4]

Indeed, application of a mandatory exhaustion rule in this case directly implicates the concern Justice Stevens expressed in his dissent from the exhaustion holding in *LaPlante*. Justice Stevens expressed concern that the exhaustion holding in *LaPlante* suggested that "an Indian Tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign State." 480 U.S. at 22. Given the procedural posture of this case, application of a mandatory exhaustion requirement would create even greater concern that an Indian tribe's judicial system is entitled to a greater degree of deference than the judicial systems of sovereign states.

In this case, the state court, at a minimum, had concurrent jurisdiction with the tribal court over this product liability action premised upon substantial off-reserva-

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[4]Further, the federal court here was not asked to enjoin any pending tribal court proceeding (*National Farmers Union*), or to decide a question already at issue as an affirmative defense in a tribal court proceeding (*LaPlante*). There was no pending tribal court proceeding; the principal issues in the case involved state product liability law; and the tribal court possessed no special expertise in the subject matter. *See*, *Stock West II*, 942 F.2d at 663. Comity does not suffice as a basis for requiring exhaustion of tribal remedies under these facts. *See, id.*

tion activities.[5] The Indian plaintiffs chose to bring their action originally in the state court, rather than the tribal court. By accepting removal jurisdiction once non-diverse defendants were dismissed from the state court action, the federal court was acting as an adjunct of the state court system. It was not attempting to act in direct competition with the tribal courts. Here, there was no more reason to require the federal court to stay its hand in order to allow the action to be brought before the tribal court for exhaustion of tribal court remedies, than there was reason for it to stay its hand pending exhaustion of state court remedies. To require mandatory exhaustion of tribal court remedies under the circumstances of this case would clearly give greater deference to the tribal court than is given to the state court.

B. The Ninth Circuit Also Erroneously Concluded That the District Court, Despite its Compelling Reasoning, Had No Discretion Not to Defer.

The district court properly noted that this case was in a procedural posture distinct from *National Farmers Union*, *LaPlante*, and other cases interpreting and applying the exhaustion rule. This case was not originally filed in federal court, but instead was removed from state court on the basis of diversity of citizenship. The case was instituted and actively prosecuted in state court for two years and then in federal court for more than two years by the very

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[5]*See, e.g.*, *Crawford v. Roy*, 577 P.2d 392, 393-94 (Mont. 1978).

Indian plaintiffs who belatedly attempted to invoke the exhaustion rule. Significant state and federal judicial resources were expended in dealing with the multiple procedural and substantive legal issues involved in the pre-trial proceedings. The district court ultimately concluded that, given the unusual procedural posture of the case and "considerations of wise judicial administration," deference and exhaustion of tribal remedies was not necessary. *See Crawford,* 737 F. Supp. at 1126-27, Appendix B at 11b-15b.

Although finding the district court's reasoning compelling, the Ninth Circuit nonetheless concluded that the district court had no discretion not to defer under *National Farmers Union* and *LaPlante.* In so doing, the Ninth Circuit apparently was of the view that exhaustion of tribal court remedies was required unless the assertion of tribal court jurisdiction fell within one of the three exceptions articulated in *National Farmers Union,* 471 U.S. at 856, n.21, or unless the disputed issue was not a reservation affair or did not arise on the reservation.[6]

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[6]The Ninth Circuit concluded that, given the situs of the harm on a reservation and the presence of Indian parties, this dispute was a reservation affair. *Crawford,* slip op. at 14963, Appendix A at 7a. It ignored the fact, however, that the defendants had not entered the reservation, or engaged in commercial dealings or other consensual arrangements with members of the tribe, or engaged in conduct which threatened or directly affected the political integrity, economic security, or health or welfare of the tribe as a whole. All transactions at issue,

Crawford, slip op. at 14961, 14963, Appendix A at pages 5a, 7a.

As this court noted in *LaPlante*, exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. 480 U.S. at 16 n.8. As such, the exhaustion rule is analogous to the abstention principles articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-19 (1976), in cases where concurrent jurisdiction exists in state and federal courts. *Id.* Under *Colorado River*, a district court clearly has discretion to defer or not defer to state court proceedings after considering a wide variety of factors, none of which is necessarily determinative. "[A] carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required." *Colorado River*, 424 U.S. at 818. Among the factors a district court should consider with regard to *Colorado River* abstention are the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them; considerations of wise judicial administration, with regard to conservation of judicial resources and comprehensive disposition of litigation; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. 424 U.S. at 817-18. Furthermore, under *Colorado River:*

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except the one-vehicle accident itself, occurred outside reservation boundaries.

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." . . . "It was never a doctrine of equity that a federal court should exercise its *judicial discretion* to dismiss a suit merely because a State court could entertain it."

Colorado River, 424 U.S. at 813-14 (citations omitted; emphasis added).

Thus, contrary to the judgment of the Ninth Circuit, because the exhaustion rule is analogous to *Colorado River* abstention principles, the district court clearly had discretion not to defer to the tribal court given the procedural posture of the case, the untimeliness of the assertion of tribal court jurisdiction, and overall considerations of wise judicial administration. Further, what this Court said in *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), regarding abstention is equally applicable here:

> The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. . . . To order [the parties] out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. . . . It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them "that promptness of decision which in all judicial actions is one of the elements of justice."

Id. at 196-97 (*quoting Forsyth v. Hammond,* 166 U.S. 506, 513 (1897).

CONCLUSION

Because the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, petitioners respectfully pray that a

writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 19th day of December, 1991.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESS WESLEY CRAWFORD; DIANE LAPLANTE; RODNEY LANE,
Plaintiffs-Appellants,

v.

GENUINE PARTS CO., INC.; ECHLIN, INC.,
Defendants-Appellees.

No. 90-35488
D.C. No. CV-87-013-GF
OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
February 8, 1991—Seattle, Washington

Filed October 31, 1991

Before: J. Clifford Wallace, Chief Judge,
Diarmuid F. O'Scannlain and Edward Leavy, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Jurisdiction

Reversing and remanding a district court judgment denying transfer of the action to a tribal court, the court of appeals held that the district court lacked discretion not to defer the case to tribal court as involving a "reservation affair" and in

the absence of an exception to the doctrine of mandatory deference.

In 1982, appellant Jess Wesley Crawford and others injured themselves in an automobile accident occurring on the Blackfeet Indian Reservation in Montana. In 1984, appellants, all members of the Blackfeet Tribe, brought an action in state court against Genuine Parts Co., Inc., alleging improper manufacture and installation of brakes on the vehicle. Genuine Parts removed the action to federal court on the basis of diversity. Shortly before trial in 1989, realizing that original jurisdiction properly lay in the tribal court, appellants requested that the district court transfer the case to the Blackfeet tribal court. The district court denied the motion to transfer and for a stay of proceedings in 1990.

[1] Under principles of comity, federal courts are required to dismiss or abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court is asserted. However, if deference is called for, the district court may not relieve the parties from exhausting tribal remedies. [2] However, mandatory deference does not follow automatically from an assertion of tribal court jurisdiction. The Ninth Circuit has held that deference to tribal courts is not required when the disputed issue is not a "reservation affair" or did not "arise on the reservation." [3] The court noted that lawsuits springing from on-reservation automobile accidents have often been considered to arise on the reservation, at least when members of the tribe were involved in the litigation. [4] The court saw no reason why arrival of this case in federal court by way of removal diminished the Supreme Court directive that federal courts not operate in direct competition with the tribal courts. [5] Although the assertion of tribal court jurisdiction in this case was years after the action was filed, because the action involved a "reservation affair" the district court lacked jurisdiction not to defer. [6] In addition, the court was satisfied that no exception to the doctrine of mandatory deference to tribal court applied here. Therefore, the case was remanded

for the district court to dismiss or to abstain in favor of tribal court proceedings.

COUNSEL

Joseph R. Mara and Thomas A. Marra, Marra, Wenz, Johnson & Hopkins, Great Falls, Montana, for the plaintiffs-appellants.

Bert A. Fairclough and Dennis P. Clarke, Smith, Walsh, Clarke & Gregoire, Great Falls, Montana, for the defendants-appellees.

OPINION

O'SCANNLAIN, Circuit Judge:

We consider whether federal court deference to Indian tribal courts is required when the assertion of tribal court jurisdiction comes on the eve of trial, years after the action was filed.

I

This action arose when an automobile accident occurred on December 20, 1982, on the Blackfeet Indian Reservation in Montana. Jess Crawford, Diane LaPlante, and Rodney Lane, all members of the Blackfeet Tribe, were in Crawford's Ford Bronco when Lane, the driver, was forced to take evasive action to avoid livestock grazing on or near the road. The Bronco overturned and all three occupants were injured; Crawford was rendered a quadriplegic.

In 1984, the three injured occupants brought suit in state court against the State of Montana and various companies

involved in the production, sale, or maintenance of the Bronco. Included were products liability claims against two companies, now known as Genuine Parts Company and Echlin, Incorporated, for the alleged improper manufacture and installation of brakes upon the Bronco. These two defendants are located outside of Montana.

Eventually, all but the two brake companies were settled out of the litigation. On January 13, 1987, the brake companies removed the action to federal district court on the ground of diversity. The district court assumed jurisdiction, consolidated the cases, and set a trial date of May 2, 1989.

On April 10, 1989, twenty-three days before trial, the three plaintiffs requested that the district court transfer the cases to the Blackfeet tribal court. The plaintiffs claimed that they had only recently realized that original jurisdiction properly lay in the tribal court. On April 14, all parties stipulated to vacating the trial date.

Over one year later, on May 8, 1990, the district court denied the motion to transfer and the parties' joint motion for a stay of proceedings. We granted permission for an immediate appeal. *See* 28 U.S.C. § 1292(b).

II

[1] In *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), the Supreme Court announced that principles of comity required federal courts to dismiss or to abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court was asserted. *See Stock West Corp. v. Taylor*, No. 90-35201, slip op. 11313, 11323-24 (9th Cir. Aug. 20, 1991) (*Stock West II*). Whether proceedings are actually pending in the appropriate tribal court is irrelevant. *See Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987) (dismissal affirmed although no

tribal court action was pending). "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R.R. Co. v. Crow Tribal Council*, No. 89-35667, slip op. 9363, 9375 (9th Cir. July 26, 1991). If deference is called for, the district court may not relieve the parties from exhausting tribal remedies. *Id.*[1]

[2] Nonetheless, mandatory deference does not follow automatically from an assertion of tribal court jurisdiction. The Supreme Court took pains to note that exhaustion would not be required "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union*, 471 U.S. at 856 n.21 (internal citation omitted). More recently, we held that deference to tribal courts is not required when the disputed issue is not a "reservation affair" or did not "ar[i]se on the reservation." *Stock West II*, slip op. at 11326.

In this case, the brake companies offer two reasons why the district court correctly declined to defer: (1) this case is not sufficiently tied to reservation interests, and (2) the assertion of tribal court jurisdiction was untimely. We examine each contention in turn.

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[1]In *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir. 1989) (*Stock West I*), we described an abuse of discretion standard of review applicable to a federal district court's decision to abstain or to dismiss pending tribal court determination of its own jurisdiction and disposition of the case. *See id.* at 1229. As we recently explained, however, the district court's "discretion" was not whether or not to require exhaustion, but whether to dismiss rather than to abstain (or vice versa). *See Burlington Northern*, slip op. at 9375.

A

The brake companies' first argument, not addressed by the district court, is that comity does not require federal court abstention or dismissal where the federal court's jurisdiction over the dispute is "derivative," having arisen by virtue of a removal from state court. The brake companies urge that this dispute involves "significant off-reservation activity," in contrast to the cases imposing a mandatory exhaustion requirement. Thus, the argument goes, Montana state courts would have at least concurrent jurisdiction over the case, and the principles of comity upon which the Supreme Court relied in *LaPlante* and *National Farmers Union* simply do not apply.

[3] There is a kernel of merit in the brake companies' legal argument. As we recently held in *Stock West II*, the mandatory exhaustion requirement announced in *LaPlante* and *National Farmers Union* does not apply when the dispute is not a "reservation affair" and did not "arise on the reservation." *See id.* However, we do not agree that this particular case fits within the *Stock West II* rule. Lawsuits springing from on-reservation automobile accidents have often been considered to arise on the reservation, at least when members of the tribe are involved in the litigation. *See, e.g., LaPlante*, 480 U.S. at 11-13 (liability of insured for accident and insurer for conduct in adjusting claim at issue); *National Farmers Union*, 471 U.S. at 847-49 (liability of insured at issue). "Such disputes clearly 'arise' on the reservation, given the situs of the harm on the reservation and the presence of Indian parties." *Stock West II*, slip op. at 11329.

[4] We are perplexed by the brake companies' invocation of "derivative jurisdiction" as an answer to the comity concerns that have animated our cases in this area. It may well be that Montana state courts have concurrent jurisdiction over this matter; nonetheless, this case currently rests in federal court, with diversity jurisdiction. We see no reason why its arrival in the court by way of removal diminishes the force of

the Supreme Court's directive that we not permit the federal courts to operate "in direct competition with the tribal courts." *LaPlante*, 480 U.S. at 16.[2]

B

The brake companies' other argument, that the assertion of tribal court jurisdiction was untimely, persuaded the district court that deference was not necessary. Tacitly recognizing that it was treading on new ground, the district court stressed the unusual procedural posture of this case and "considerations of wise judicial administration" that emphasized the desirability of continued proceedings in the district court.

[5] While the district court's reasoning was compelling, we do not perceive room in the Supreme Court's precedents for a decision not to defer. When the dispute is a "reservation affair," as we have just concluded that this dispute is, there is no discretion not to defer under *LaPlante* and *National Farmers Union*. *See Burlington Northern*, slip op. at 9375. Thus, the federal court action must be deferred in favor of tribal court proceedings unless the assertion of tribal court jurisdiction falls within one of the *National Farmers Union* exceptions: (1) asserted with a desire to harass or in bad faith, (2) action patently exceeds the tribal court's jurisdiction, or (3) exhaustion is futile due to inadequate opportunity to contest. 471 U.S. at 856 n.21.

[6] Only the first exception, "bad faith," arguably applies. We are not convinced that the assertion of tribal court jurisdiction was motivated by a desire to harass or otherwise made in bad faith. The district court, which is in a much better position to assess the parties' motives than we, did not find bad faith or harassment in the late motion to transfer. We do not

[2]We have no occasion to consider the comity implications on tribal court jurisdiction of concurrent subject matter jurisdiction in state courts.

interpret the district court's description of the assertion of tribal jurisdiction as "dilatory," or its concern that a mandatory exhaustion requirement "would lend itself to procedural 'fencing' " to be a finding that the occupants' conduct amounted to bad faith. Hence, we are satisfied that no exception to the doctrine of mandatory deference to tribal courts applies here.

III

The district court correctly anticipated our conclusion in *Stock West II* that the exhaustion requirement, though often described as "mandatory," is not in fact absolute even where concurrent jurisdiction may lie in the tribal courts. However, this is not a case in which a district court enjoys discretion to proceed. The dispute "arose on the reservation" and the assertion of tribal court jurisdiction did not fall within one of the *National Farmers Union* exceptions. We remand for the district to dismiss or to abstain in favor of tribal court proceedings.

REVERSED and REMANDED.

APPENDIX B

Jess Wesley CRAWFORD, Plaintiff,

v.

GENUINE PARTS CO., a Georgia corporation; and Echlin, Inc., a Connecticut corporation, Defendants.

Diane LaPLANTE and Rodney Lane, Plaintiffs,

v.

GENUINE PARTS CO., formerly NPA Automotive Parts & Accessories; Echlin Inc., formerly Echlin Manufacturing Company, Defendants.

Nos. CV-87-013-GF, CV-87-040-GF.

United States District Court,
D. Montana,
Great Falls Division.

May 8, 1990

Joseph R. Marra, Dan Spoon, Marra, Wenz, Johnson & Hopkins, Great Falls, Mont., for plaintiff.

Dennis P. Clarke, Smith, Walsh, Clarke & Gregoire, Great Falls, Mont., for defendants.

Edmund F. Sheehy, Jr., Cannon & Sheehy, Helena, Mont., for Kim Crawford on Attys. Lien only.

MEMORANDUM AND ORDER

HATFIELD, Chief Judge

These consolidated personal injury actions have their genesis in a vehicular mishap which occurred on U.S. Highway No. 89, at a location within the exterior boundaries of the Blackfeet Indian Reservation, Montana. Both actions were initially instituted in the district court of the State of Montana. Approximately two and one-half years after the actions were filed in state court, plaintiffs in both actions effected settlement with, and voluntarily dismissed, all nondiverse defendants. Genuine Parts Company and Echlin, Inc., both non-resident corporations, then removed both actions to this court, pursuant to 28 U.S.C. § 1441. On April 10, 1989, over two years after the actions were removed to this court, and less than thirty days prior to the time the actions were set for trial, plaintiffs moved the court to stay these proceedings until such time as the plaintiffs could institute identical proceedings in the tribal court system of the Blackfeet Indian Reservation. Plaintiffs, all Indian persons, and members of the Blackfeet Tribe of Indians, impress upon the court the Blackfeet Tribal Court must be afforded the opportunity to determine that entity's jurisdiction over the subject matter of this controversy.

The plaintiffs' motion is predicated upon a dilatory invocation of the "exhaustion rule" first enunciated in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*,

471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985)[1], and extended in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).[2] The issue to be determined is whether this court must abstain from exercising diversity jurisdiction over the subject matter of these controversies until it has afforded the tribal court system of the Blackfeet Indian Reservation an opportunity, in the first instance, to determine the propriety of that entity asserting jurisdiction over these controversies.

I.

The plaintiffs, Jess Crawford, Diane LaPlante and Rodney Lane, all members of the Blackfeet Indian Tribe, were allegedly injured on February 24, 1983, when a vehicle, being driven by Crawford within the boundaries of the Blackfeet Indian Reservation, overturned. On July 13, 1984, plaintiff Crawford filed suit in the District Court of the Eighth Judicial District of the State of Montana. Crawford advanced claims for relief against multiple

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[1]In *National Farmers*, non-Indian plaintiffs directly challenged the right of the tribal court to assert civil jurisdiction over them. Invoking the jurisdiction of the Federal district court pursuant to 28 U.S.C. § 1331, the plaintiffs sought to enjoin the tribal court proceedings.

[2] In *LaPlante*, the Court, relying upon rationale underlying its decision in *National Farmers Union*, held that a federal court may not exercise diversity jurisdiction over a civil dispute relating to reservation affairs before an appropriate Indian tribal court system has had an opportunity to determine its own jurisdiction. 480 U.S. at 16, 107 S.Ct. at 977.

defendants based upon various theories of liability.[3] With specific reference to the defendants, Genuine Parts Company and Echlin, Inc., Crawford alleged the mishap, and consequent injuries he sustained, were caused by the failure of replacement parts for the vehicle braking system which were manufactured and/or marketed by the defendants.

Plaintiffs, Diane LaPlante and Rodney Lane, passengers in the Crawford vehicle at the time of the mishap, filed a joint complaint in the District Court of the Eighth Judicial District of the State of Montana on September 25, 1984. The complaint of the latter plaintiffs essentially mimicked the claims of Crawford.

Both Genuine Parts Company and Echlin, Inc., have their principal places of business in states other than Montana. The master cylinder rebuild kit at issue was manufactured outside the State of Montana and was sold at a retail outlet in Columbia Falls, Montana; a location outside the boundaries of the Blackfeet Indian Reservation. Installation of the master cylinder kit in the Crawford vehicle, as well as Crawford's purchase of the vehicle, occurred at locations outside the reservation boundaries. In sum, with the exception of the mishap itself, all transactions

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[3] Asserting the cause of the mishap was the failure of the braking system in the vehicle, Crawford named as defendants: the used car dealership from which he purchased the vehicle, the car service entity which had serviced the brake system of the vehicle, and those commercial entities which manufactured and/or marketed the brake master cylinder rebuild kit which was installed in the vehicle.

relating to the plaintiffs' causes of actions occurred outside the boundaries of the Blackfeet Indian Reservation.

Plaintiffs take the position the present situation falls within the ambit of the "exhaustion rule" announced in *National Farmers Union*. Because the vehicular mishap occurred within the exterior boundaries of the Blackfeet Indian Reservation, they submit this court must refrain from exercising diversity jurisdiction, and, for reasons of comity, defer to the Blackfeet Tribal Court, in order to allow that entity to examine, in the first instance, whether it has the power to exercise jurisdiction over the subject matter of these controversies.

II.

[1,2] The Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on a reservation. *See, e.g., Montana v. United States*, 450 U.S. 544, 566, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 98 S.Ct. 1670, 1680, 56 L.Ed.2d 106 (1978). This authority emanates from the fact the several Indian tribes, as sovereign entities, possess the necessary attributes of sovereignty over both their members and their territory. *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978); *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975). The sovereignty enjoyed by Indian tribes, however, is not absolute. Rather, it is subject to limitation by specific treaty provisions, by statute at the will of Congress, by portions of the Federal Constitution found especially binding on the tribes, or by implication due to the tribes' dependent status. *See, United*

States v. Wheeler, *supra*, 435 U.S. at 322-326, 98 S.Ct. at 1085-88; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987); *Babbitt Ford, Inc. v. Navajo Tribe*, 710 F.2d 587, 591, 107 S. Ct. 971, 975, 94 L.Ed.2d 10 (9th Cir. 1983).

A recurring issue involving Indian tribal sovereignty is to what extent the tribes retain the inherent power to exercise civil subject matter jurisdiction over the activities of non-Indians on the reservation. The United States Supreme Court has addressed the limitations on tribal sovereignty with respect to the assertion of civil jurisdiction over non-Indians. In the case of *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the Court reiterated the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. *Id.* at 565, 101 S.Ct. at 1258. Recognizing the dependent status of the tribes necessarily entails a divestiture of some attributes of sovereignty, the Court endeavored to delineate the extent to which the Indian tribes retain their inherent sovereign power to exercise civil jurisdiction over the activities of non-Indians occurring within a reservation. The Court concluded:

> A tribe may regulate through taxation, licensing or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health

or welfare of the tribe. 450 U.S. 565-566, 101 S.Ct. at 1258 (citations omitted).

These two narrowly prescribed exceptions to the implicit divestiture of the sovereign power of the Indian tribes to control the activities of non-members would seem to provide the only basis upon which an Indian tribe possesses civil jurisdiction over a non-Indian.

[3] The question of whether an Indian tribe retains the authority to compel a non-Indian to submit to the jurisdiction of a tribal court presents a question of federal law, properly determined by the federal courts; the final arbiters of federal law. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852, 105 S.Ct. 2447, 2451, 85 L.Ed.2d 818 (1985).[4] Nonetheless, considerations of comity, predicated upon the well recognized Congressional policy of promoting tribal self-government and self-determination, compelled the Court in *National Farmers Union* to announce a rule of exhaustion, which requires tribal court remedies to be exhausted before the question of tribal jurisdiction is addressed by the federal courts. 471 U.S. at 856-57, 105 S.Ct. at 2453-54. The Court concluded proper respect for tribal legal institutions

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[4] In *National Farmers Union*, the Supreme Court recognized the question of whether a tribal court has exceeded its jurisdiction must be answered by reference to federal law. 471 U.S. at 853, 105 S.Ct. at 2452. Consequently, the Court held that a federal court possesses jurisdiction under 28 U.S.C. § 1331 to determine whether a tribal court has exceeded the lawful limits of its jurisdiction. 471 U.S. at 853, 105 S.Ct. at 2452.

required the federal courts to afford those tribunals a full opportunity to consider the issues before them, and to rectify any errors. 471 U.S. at 857, 105 S.Ct. at 2454. Unconditional access to the federal forum, the Court reasoned, would contravene the federal policy supporting tribal self-government by placing the federal courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 16, 107 S. Ct. at 977.

The principle of federal deference embodied in the "exhaustion rule" is compelling regardless of whether federal jurisdiction is grounded in diversity of citizenship or federal question:

> Regardless of the basis for jurisdiction, federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction. In diversity cases, as well as federal question cases, unconditional access to the federal forum would place it in direct competition with tribal courts, thereby impairing the latter's authority.

Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. at 16, 107 S.Ct. at 977 (citation omitted).

[4] The paradigm case calling for application of the "exhaustion rule" is, of course, one like *National Farmers Union*, where the jurisdiction of a tribal court over a controversy pending before that tribunal, is directly challenged by way of an action for declaratory judgment in

federal court. 471 U.S. at 856, 105 S.Ct. at 2454. However, in *Iowa Mutual*, the Court extended the "exhaustion rule" to preclude federal court adjudication of the merits of a controversy pending in a tribal court, regardless of the fact the federal court's jurisdiction was concurrent with the tribal court. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 16 n.8, 107 S.Ct. at 976 n.8. The Court deemed it imperative that federal courts refrain from intervening until the tribal legal institutions had a full opportunity to evaluate the claim. 480 U.S. at 16, 107 S.Ct. at 977. The Court drew no distinction between the situation where the purpose of the federal action was to directly challenge the tribal court's jurisdiction over a pending case, and the situation where the merits of the controversy were simply placed before the federal court. 480 U.S. at 9, 107 S.Ct. at 971.[5] The general proposition emerges from these cases that the federal courts, as a matter of comity, must refrain from exercising jurisdiction where the exercise of

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[5] On this point, Justice Stevens, author of the majority opinion in *National Farmers Union*, disagreed with the opinion of the majority in *Iowa Mutual*. In his view: "[t]he deference given to the deliberations of Tribal Courts on the merits of a dispute, however, is a separate matter as to which *National Farmers Union* offers no controlling precedent.... The mere fact that a case involving the same issue is pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty to adjudicate a controversy properly before it." 480 U.S. at 21-22, 107 S.Ct. at 979-80 (Stevens, J., dissenting) (*citing*, *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)).

that jurisdiction would interfere, directly or indirectly, with a tribal legal institution's opportunity to consider the issues before them.

Since *Iowa Mutual*, the court of appeals for this circuit has interpreted the "exhaustion rule" to require exhaustion of tribal court remedies with respect to a civil controversy arising in Indian territory, irrespective of whether proceedings involving the same controversy are actually pending in the tribal forum. *See*, *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577 (9th Cir. 1987). *Wellman* was a breach of contract action instituted in this court by a Blackfeet Indian contractor against a non-Indian corporation. Jurisdiction was founded upon diversity of citizenship. The subject contract involved work which was to have been performed on reservation lands. This court dismissed the action for lack of subject matter jurisdiction. Upon appeal, the Ninth Circuit Court of Appeals held the action was properly dismissed upon the basis of comity, rather than lack of subject matter jurisdiction. *Wellman v. Chevron, U.S.A., Inc.*, 815 F.2d 577, 578. The court concluded the parties to a civil dispute arising in Indian territory are limited to tribal court as the forum of "first recourse". 815 F.2d at 579. *Wellman* would appear to stand for the proposition that tribal remedies must be exhausted before a federal court, in the exercise of diversity jurisdiction, may address the merits of a civil action concerning a dispute which arose in Indian territory. *See*, *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1227 (9th Cir. 1989).[6]

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[6] It is imperative to note the defendant in *Wellman* invoked the exhaustion at the time of its initial appearance.

The cases at bar present themselves in a procedural posture distinct from that presented in *National Farmers Union*, *Iowa Mutual* or any of the cases discussed which have interpreted and applied the "exhaustion rule". First, the cases were not originally filed in federal court, but were removed to the federal forum on the basis of diversity of citizenship. Second, the cases were instituted, and actively prosecuted for a significant time in both this court and the Montana court system, by those same parties who now invoke the "exhaustion rule". Third, significant judicial resources, both state and federal, were expended in the disposition of a myriad of procedural and substantive legal issues during the pretrial proceedings; proceedings which the movants instituted and participated in without objection. The question necessarily arises whether each of these factors should bear upon the propriety of this court deferring to the Blackfeet Tribal Court in the interest of fostering comity between the respective sovereigns. Because the precise dimensions of the "exhaustion rule" remain to be defined, the answer to this inquiry is not readily apparent.[7]

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[7] Guidance in resolving the query, however, may be found in review of the principle of comity as it has evolved in the context of state and federal relations. Support for this analogy is found in *Iowa Mutual*, where Justice Marshall, speaking for the majority, expressly acknowledged the "exhaustion rule" enunciated in *National Farmers Union* is analogous to the principle of abstention articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 13 n.4, 107 S. Ct. at 875 n.4. "In *Colorado River*, as here, strong federal policy concerns favored

The question of what result should obtain from a party's failure to timely invoke the exhaustion rule might be answered in three different ways.[8] First, the movants' failure to timely assert the "exhaustion rule" as mandating deference to the Tribal Court might be treated as a procedural default precluding the movants from relying upon the rule. Second, and at the other extreme, the non-exhaustion might be treated as an inflexible bar to consideration of the merits of the case. Or, third, the court may conclude it is vested with the discretion to decide, in each case, whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the action forthwith. 481 U.S. at 131, 102 S.Ct. at 1673.

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resolution in the nonfederal forum." *Id.* (*citing*, *Colorado River*, 424 U.S. at 819, 96 S.Ct. at 1247). Likewise, the court of appeals for this circuit has recognized the analogous nature of these abstention doctrines. *See*, *Stock West, Inc. v. Confederated Tribes*, *supra*, 873 F.2d at 1229. (Holding the abuse of discretion standard applies to appellate court review of district court's dismissal of action in favor of tribal court proceedings).

[8] The Supreme Court recently had occasion, in the context of habeas corpus proceedings under 28 U.S.C. § 2254, to address the effect to be afforded a state's failure to raise the defense of "non-exhaustion" of state remedies. *Granberry v. Greer*, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1986). The analytical framework employed by the Court in *Granberry* lends itself to utilization in the present context.

The plaintiffs would have the court adopt the view that the "exhaustion rule" represents an inflexible bar, which precludes this court from addressing, in the first instance, the merits of a civil dispute which arose on an Indian reservation. The court is unpersuaded this extreme position is explicit in the holdings in *National Farmers Union* or *Iowa Mutual*.[9] The argument would have more superficial

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[9] In relation to the idea of non-exhaustion being an "inflexible" bar, the opinion in *Granberry* refers to the Court's decisions in *Iowa Mutual* and *National Farmers Union*. 481 U.S. at 131, n. 4, 107 S.Ct. at 1673 n. 4. The reference parenthetically indicates *Iowa Mutual* held "[a] district court may not exercise diversity jurisdiction until remedies in parallel tribal court proceeding may have been exhausted." The reference further indicates *National Farmers Union* establishes "comity requires that tribal remedies be exhausted before district court considers issue of tribal court jurisdiction." These references to *Iowa Mutual* and *National Farmers Union* should not be viewed as dispositive of the precise issue *sub judice*. The Court's holdings in those cases cannot be divorced from their factual underpinnings. In *Iowa Mutual* parallel tribal court proceedings were pending. In *National Farmers Union*, the jurisdiction of the tribal court was being subjected to a direct challenge over proceedings pending before it in federal court. Granted, nonexhaustion may be inflexible where parallel tribal court proceedings are pending. However, this court does not perceive the references as either an express or implied adoption by the Court of an inflexible rule of exhaustion which would serve to preclude the federal courts from

appeal if the federal action was the paradigm case, as in *National Farmers Union*, wherein the federal action directly challenged the jurisdiction of a Tribal Court over a case pending before it. Likewise, non-exhaustion may prove an inflexible bar to a determination on the merits, in federal court, of a civil controversy which is the subject of pending proceedings in a tribal court. In both of these situations, however, "unconditional access to the federal forum would place the federal courts in direct competition with tribal courts" and deprive the tribal legal institutions of a "full opportunity to consider the issues before it and to rectify any errors." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 16, 107 S.Ct. at 977.

The necessity of deferring to tribal courts is certainly less compelling when no party to the federal court proceedings has availed himself of the tribal forum, or, at the very least, timely requested the federal court to afford him the opportunity to do so. Reason alone would dictate that in such a circumstance, the federal court consider whether an insistence on exhaustion of tribal court remedies would prove conducive to either the promotion of tribal selfgovernment or the orderly administration of justice; the principal considerations upon which the exhaustion rule is bottomed. *See*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. at 16, 107 S.Ct. at 977; *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. at 856, 105 S.Ct. at 2454.

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exercising jurisdiction, in the first instance, over the merits of any civil dispute having its genesis in a transaction which occurred within an Indian reservation.

The orderly administration of justice would hardly be promoted by the adoption of a rule which would allow a party to invoke the jurisdiction of the federal court, heedlessly proceed to avail himself of federal judicial resources, and yet not require the party to timely request the opportunity to seek recourse in the tribal forum. In that vein, the court finds it doubtful that respect for the tribal court system would be advanced, to any degree, by the adoption of a rule which would lend itself to procedural "fencing".

Considerations of wise judicial administration compel the court to hold that the failure of the plaintiffs to seasonably avail themselves of the opportunity to adjudicate this controversy in the Blackfeet Tribal Court precludes them from invoking the "exhaustion rule". This court need not stay its hand at this juncture. The federal courts' "virtually unflagging obligation" to exercise the jurisdiction given them, *England v. Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 464, 11 L.Ed.2d 440 (1964), need not yield under the circumstances of this case. Therefore,

IT IS HEREBY ORDERED that the joint motion of the plaintiffs requesting a stay of these proceedings be, and the same hereby is, DENIED. The parties are advised the court shall consider the propriety of certifying an interlocutory appeal of the present order upon proper application of any party.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

JESS WESLEY CRAWFORD,	)	
Plaintiff,	)	NO. CV-87-013-GF
vs.	)	
GENUINE PARTS CO., a Georgia corporation; and ECHLIN, INC., a Connecticut corporation,	)	
Defendants.	)	
DIANE LaPLANTE and RODNEY LANE,	)	
Plaintiffs,	)	NO. CV-87-040-GF
vs.	)	
GENUINE PARTS CO., formerly NPA AUTOMOTIVE PARTS & ACCESSORIES; ECHLIN INC., formerly ECHLIN MANUFACTURING COMPANY,	)	ORDER
Defendants.	)	

The plaintiffs in these consolidated actions request the court to amend the interlocutory order entered by the court on May 8, 1990, denying the plaintiffs' motion for a stay of these proceedings. In the memorandum and order of May 8, 1990, the court expressly advised the parties it would consider the propriety of certifying an immediate appeal of the subject order pursuant to 28 U.S.C. § 1292(b). The plaintiffs have filed a joint motion requesting the court to amend the order of May 8, 1990, to include the statement prescribed by 28 U.S.C. § 1292(b); a prerequisite to the appeal of an interlocutory order of a district court, pursuant to Fed.R.App.P. 5(a).

Cognizant of the ramifications attendant the court's application of the "exhaustion rule", as espoused by the United States Supreme Court in National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), to the present actions, as well as all civil disputes having their genesis in transactions occurring upon the numerous Indian reservations located in the District of Montana, the court deems it prudent to allow the plaintiffs an immediate appeal of the interlocutory order entered on May 8, 1990. The court is mindful the defendants have not been afforded the opportunity to respond to the plaintiffs' motion. Nonetheless, because the court is of the opinion its application of the "exhaustion rule", as embodied in the order of May 8, 1990, involves a controlling question of law as to which there exists a substantial ground for difference of opinion, the court deems it unnecessary to contemplate further briefing by the parties.

Therefore, having considered the merits of the plaintiffs' motion to amend the order entered in these consolidated actions on May 8, 1990, and being fully advised in the premises,

IT IS HEREBY ORDERED that the memorandum and order entered by the court on May 8, 1990, shall be amended commencing on page 15, the last paragraph, and continuing to page 16, to provide as follows:

> IT IS HEREBY ORDERED that the joint motion of the plaintiffs requesting a stay of these proceedings be, and the same hereby is, DENIED. The court further states, for purposes of certification pursuant to 28 U.S.C. § 1292, that it is of the opinion the present order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

DATED this 16 day of May, 1990.

PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

§ 1441. Actions Removable Generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by § 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may may [sic] remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in § 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of § 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim and such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1441 (as amended December 1, 1990).

§ 1332. Diversity of Citizenship; Amount in Controversy; Costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs, and is between--

(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign State;
(3) citizens of different States and in which citizens or subjects of a foreign State are additional parties; and

(4) a foreign State, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of Ten Thousand Dollars, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided*, *further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1332 (as amended October 21, 1976).

No. 91-1037

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GENUINE PARTS CO., INC., a Georgia corporation; and ECHLIN, INC., formerly ECHLIN MANUFACTURING COMPANY, a Connecticut corporation,

Petitioners,

vs.

JESS WESLEY CRAWFORD, DIANE LA PLANTE, and RODNEY LANE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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January 1992

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Respondents (Plaintiffs) do not question jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

This is a products liability case in which the Plaintiffs, three members of the Blackfeet Indian Tribe, were injured in an automobile accident on the Blackfeet Indian reservation, allegedly, as the result of defective automobile parts manufactured, distributed and sold by the Petitioners (Defendants).

Defendants contend that the Court of Appeals erred in requiring the District Court to defer to the Tribal Court because (1) the issues raised by the facts are not sufficiently tied to reservation interests and (2) the District Court had the discretion to determine that the assertion of Tribal Court jurisdiction by the Plaintiffs was not timely.

STATEMENT OF THE FACTS

Defendants' statement of the facts is substantially correct except that it omits significant facts, therefor, Plaintiffs provide this brief statement which is necessarily repetitious.

On December 20, 1982, Plaintiffs, all of whom are enrolled members of the Blackfeet Tribe, were severely injured (Crawford is quadriplegic) in an automobile accident which occurred within the boundaries of the Blackfeet Indian Reservation situated in the State of Montana. Defendants are automotive parts manufacturers and distributors from outside the State of Montana who sell their nationally advertised (NAPA) replacement parts throughout the United States, including Montana and the Blackfeet Reservation.

Plaintiffs commenced their lawsuits in 1984 (Crawford first and later LaPlante and Lane) in state district court against these Defendants and others, some of whom were Montana residents.

One of the cases (Crawford's) was set for trial, with discovery closed, in the state court for January 26, 1987. Shortly before that date, Plaintiffs settled and dismissed their claims against the other defendants in the state court, leaving only these out-of-state Defendants as parties.

These Defendants removed the case to the Federal District Court on January 13, 1987, based upon diversity jurisdiction. The Federal District Court assumed jurisdiction, set new discovery schedules and consolidated the cases at Defendants' request, and set the trial for May 2, 1989.

When Plaintiffs commenced these lawsuits (Crawford in July of 1984), the law was not clear that they should have been commenced in the Blackfeet Tribal Court. They did not become aware of mandatory deference until April 7, 1989. On April 10, 1989, Plaintiffs apprised the Federal Court of how and when they became aware that original jurisdiction was properly before the Blackfeet Tribal Court and moved that the case be transferred there.

Four days thereafter, on April 14, 1989, all of the parties, including Defendants, entered into a written stipulation agreeing that the trial date should be vacated because there was a "serious question as to whether any further proceedings by this Court would be a nullity" and that "further expense and inconvenience" would be avoided by vacating the trial until it was determined whether the Federal District Court

had the authority to proceed.

Approximately a year later, on May 8, 1990, the Federal District Court denied Plaintiffs' motion to transfer the case to the Blackfeet Tribal Court stating:

> The failure of the Plaintiffs to seasonably avail themselves of the opportunity to adjudicate the controversy in the Blackfeet Tribal Court precludes them from invoking the exhaustion rule.

Tacitly, the District Court agreed with Plaintiffs that the Blackfeet Tribal Court had original jurisdiction but refused to relinquish jurisdiction because it found Plaintiffs' request untimely.

The District Court expressed some uncertainty as to its opinion and Plaintiffs were permitted to appeal pursuant to 28 U.S.C. Sec. 1292(b). The Ninth Circuit Court of Appeals agreed to hear the appeal. Upon hearing, it remanded the case to the District Court with directions to dismiss or abstain in favor of the Tribal Court proceeding, finding that the "dispute arose on the reservation" and Plaintiffs' motion to transfer the case to Tribal Court was not made in "bad faith."

ARGUMENT

I.

THE WRIT SHOULD NOT BE GRANTED

There are no special and important reasons for granting the Writ, and the Court of Appeals' decision is neither in conflict with recent decisions of other courts of appeal or the decisions of this Court, as required by Rule 10 of this Court.

On the contrary, the decision is consistent with this Court's decisions in *National Farmers Union v. Crow Tribe of Indians,* 105 S.Ct . 2447, 471 U.S. 845 (1985), the leading case on tribal court jurisdiction, and *Iowa Mutual Ins. Co. v. LaPlante,* 107 S.Ct. 971, 480 U.S. 9 (1987), as well as recent decisions of the federal courts, *Burlington Northern R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, (9th Cir. 1991); *Stock West, Inc. v. Confederated Tribes,* 873 F.2d 1221 (9th Cir. 1989); *Wellman v. Chevron U.S.A., Inc.,* 815 F. 2d 577 (9th Cir. 1987); *A & A Concrete, Inc. v. White Mountain Apache Tribe,* 781 F.3rd 1411, (9th Cir.) cert. den. 476 U.S. 1117, 106 S.Ct. 2008 (1986); *Brown v. Washoe Housing Authority*, 835 F.2d 1327, 1328 (10th Cir. 1988). The cases variously express the view that since the development of the tribal court system on the reservations, those courts have the inherent power and the right to determine civil disputes affecting the interests of Indians and non-Indians arising on the reservation.[1,2] In effect, they mandate that federal courts dismiss or abstain from deciding such cases until tribal remedies are exhausted.[3]

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[1]*National Farmers Union v. Crow Tribe of Indians,* cited *supra,* holds tribal courts may exercise civil jurisdiction over non-Indians in a personal injury action arising on the reservation; that federal courts must defer to tribal courts until tribal remedies are exhausted, and that judicial preference for tribal court exhaustion accords with Congressional preference for tribal self-government.

[2]*Iowa Mutual Ins. Co. v. LaPlante,* cited *supra*, holds that civil jurisdiction over the activities of non-Indians on reservations presumptively lies in the tribal court unless limited by either treaty or statute and that neither the diversity statute nor its history suggest Congressional intent to override the federal policy of deference to tribal courts.

[3]*Stock West v. Confederated Tribes,* cited *supra* (p. 1228), holds that a party cannot either consent to or waive jurisdiction.

II.

THE COURT OF APPEALS CORRECTLY FOUND THIS CASE SUFFICIENTLY TIED TO RESERVATION INTERESTS TO WARRANT INVOKING THE EXHAUSTION RULE

Defendants argue, commencing at page 9 of their brief, that:

> This case is not sufficiently tied to reservation interests to warrant invoking the exhaustion rule ... over which it, like the state court from which the controversy was removed, had jurisdiction.

Defendants' statement that the State Court had concurrent jurisdiction is incorrect. The State Court had no jurisdiction.This was determined by the Montana Supreme Court in *Geiger v. Pierce,* 758 P.2d 279, 233 Mont. 18 (1988), which reluctantly determined that state courts had no jurisdiction over civil actions arising within the boundaries of an Indian reservation and set aside a state court judgment.

The Federal District Court has concurrent jurisdiction but must, as was decided here by the Court of Appeals, defer to the Tribal Court which has the first right to make whatever decisions are proper.

The principal thrust of the Defendants' argument is that because the parts were manufactured outside the reservation and in this instance were purchased and installed in Columbia Falls, Montana, a town off of the reservation, there is not a sufficient "reservation interest".

Defendants place their NAPA products into the stream of commerce; they are advertised, sold and used throughout the United States and the Blackfeet Reservation.

The Blackfeet Nation has some 13,000 enrolled Indians, approximately half of whom live within the boundaries of the reservation. Contrary to Defendants' assertion, the Defendants' activities may affect and threaten the economic security and welfare of the Tribe as a whole, at least as much or (by reason of the communal character of reservation life, and their limited health resources) more than they affect a citizen of one of the states, each of which applies its own liability laws based upon the primary fact that the injury occurred within its boundaries.

As stated in 4 Wright & Miller, Federal Practice and Procedure, Sec. 1069:

> It seems appropriate for the place of injury to assert jurisdiction when the entry of defendant's products or parts into the forum is part of a consistent pattern of multi-state business so that it is reasonable for him to foresee the potential dispersion of his products at the time they are sold. (pp. 391-392)

The incongruous result of adopting Defendants' position would permit everyone in the United States to bring a lawsuit against the manufacturer of a defective product in his own state, and have the matter decided under the law of that state if it was the situs of the injury, except for Indians who live on reservations. Such a result could permit reservations to become the dumping grounds for defective products.

This fundamentally unfair result was clearly not the intention of *National Farmers Union v. Crow Tribe, Iowa Mutual Ins. Co. v. LaPlante,* and their progeny, some of which are cited supra, which are directed toward the furtherance of tribal self-government and mandate deference to tribal courts.

III.

THERE IS NO MERIT IN THE DEFENDANTS' ARGUMENT THAT PLAINTIFFS' ASSERTION OF TRIBAL JURISDICTION WAS UNTIMELY AND WASTED JUDICIAL RESOURCES

Defendants assert that the Plaintiffs were responsible for failing to invoke tribal jurisdiction earlier. In fact, the Defendants and the Court itself had an equal responsibility.

Defendants' brief (p. 22) argues that Plaintiffs "belatedly" invoked the exhaustion rule which resulted in wasting significant judicial resources entitling the District Court as a matter of wise judicial administration to refuse to defer to the tribal court.

First, the cases requiring exhaustion of tribal remedies were decided after 1984, the year in which these lawsuits were commenced in the State Court. *National Farmers Union v. Crow Tribe* was decided in 1985 and *Iowa Mutual Ins. Co. v. LaPlante* in 1987. It was not unreasonable for the Plaintiffs to be unaware of the Indian jurisdictional case law evolving while the lawsuit was pending. The record shows that as soon as they learned that jurisdiction was properly in the Tribal Court, they called it to the attention of the Federal District Court and moved to transfer it.

There was no less an obligation upon the Defendants, and indeed upon the District Court itself, to be aware of the evolving case law . As stated in 13 Federal Practice & Procedure (Wright, Miller, Cooper), Sec. 3522, pp. 69, 70:

> [E]ven if the parties remained silent, it is well settled that a federal court, whether trial or appellate, is obliged to notice on its own motion the want of its own jurisdiction ... (cases cited footnote 12)

Second, it is not true that the Plaintiffs engaged in delaying tactics. The record[4] bears out that Plaintiffs prosecuted the case with diligence, and that it was the Defendants who engaged in delaying tactics. It is common knowledge that delay does not usually inure to the benefit of indigent plaintiffs.

Third, as stated previously herein, four days after the Plaintiffs made the motion to transfer the case to the Tribal Court, the Defendants agreed in a written stipulation that judicial resources may be wasted if jurisdiction was not determined before proceeding to trial.

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[4] *A & A Concrete v. White Mountain Apache Tribe,* cited *supra* (p. 1417), holds that the record must show that jurisdiction is asserted in bad faith or with a motive to harass in order to come within *National Farmers Union's* exception to mandatory deference.

Fourth, as stated in 13 Federal Practice and Procedure (Wright, Miller & Cooper), Sec. 3522, pp. 66, 67:

> [P]arties cannot waive lack of jurisdiction by express consent, or by conduct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants. (Cases cited in footnotes.)

Finally, none of the cases addressing tribal jurisdiction even suggest that time limitations exist with regard to the invocation of tribal jurisdiction or that parties may waive their right to exhaust their remedies.[5]

The Ninth Circuit Court of Appeals' decision in *Stock West v. Confederated Tribes,* cited *supra*, succinctly reviews the principles applicable here:

> In considering the jurisdiction questions, it should be remembered that "[i]t is a fundamental principle that federal courts are courts of limited jurisdiction." *Owen Equip & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed. 2d 274 (1978). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *California ex rel. Younger v. Andrus,* 608 F.2d 1247, 1249 (9th Cir. 1979). (p. 1225)

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[5]*Burlington Northern R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1245 (9th Cir. 1991), holds the requirement of exhaustion of tribal remedies is not directory; it is mandatory.

... the Court in Iowa Mutual noted that civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18, 107 S.Ct. a t 978. The court went on to point out that in matters concerning reservation affairs, "tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16, 107 S.Ct. at 977. (p. 1228)

[A] party cannot waive by consent or contract a court's lack of *subject matter* jurisdiction, *Securities & Exchange Common v. Blazon Corp.*, 609 F.2d 9600, 965 (9th Cir. 1979). (p. 1228)

... under *National Farmers,* the federal courts should not even make a ruling on tribal court jurisdiction in this case until tribal remedies are exhausted. (p. 1228)

[E]xhaustion of tribal remedies is a prerequisite to a federal action, ... (p. 1229)

"[C]ongress is committed to a policy of supporting tribal self-government and self-determination." *National Farmers,* 471 U.S. at 856 , 105 S.Ct. at 2454 (footnote omitted), and that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mutual,* 480 U.S. at 18, 107 S.Ct. at 978. Indeed, "[i]n diversity cases, ... unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16, 107 S.Ct. at 977. (p. 1230)

CONCLUSION

1. The civil jurisdiction of the Blackfeet Tribal Court is not limited by any treaty provision or federal statute placing time limitations on invocation of its jurisdiction. The limitation rule imposed by the district court does not comport with either Congressional intent to encourage tribal sovereignty or this Court's mandate to uphold it.

2. The Court of Appeals' decision correctly found in accord with the federal courts' decisions that the District Court was required to defer to the Tribal Court under the facts.

3. Contrary to Defendants' contentions, the state court has no jurisdiction and serious reservation interests are involved. The injury occurred on the Blackfeet Reservation, and the injured parties are all members of the Blackfeet Tribe.

Defendants' activities in placing their allegedly defective products within the stream of commerce so that they are used and sold throughout the United States and the Blackfeet Reservation, are activities which may foreseeably affect and threaten the economic security and the welfare of the tribe as a whole.

4. The record discloses that the Plaintiffs, who had no more obligation to be aware of the evolving Indian jurisdictional case law than either the Defendants or the District Court, were neither dilatory nor acting in bad faith when they invoked tribal jurisdiction as soon as they learned it was proper.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 15th day of January, 1992.

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No. 91-1037

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OCTOBER TERM, 1991

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Petitioners,

vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

REPLY TO RESPONDENTS' FACTUAL MISSTATEMENTS

In their Brief in Opposition, respondents, for the first time in this case, disingenuously assert that petitioners Genuine Parts Co., Inc. ("Genuine Parts"), and Echlin, Inc. ("Echlin"), have advertised and sold NAPA replacement parts throughout the Blackfeet Reservation. At page 2 of the Brief in Opposition, respondents state:

> *Defendants* are automotive parts manufacturers and distributors from outside the State of Montana who *sell their nationally advertised (NAPA) replacement parts throughout* the United States, including Montana and *the Blackfeet Reservation*. [Emphasis added.]

Again, at page 7, they assert:

> Defendants place their NAPA products into the stream of commerce; *they are advertised, sold, and used throughout* the United States and *the Blackfeet Reservation*. [Emphasis added.]

Finally, at page 12, respondents claim that petitioners' activities "in placing their allegedly defective products within the stream of commerce so that *they are used and sold throughout* the United States and *the Blackfeet Reservation*, are activities which may foreseeably affect and threaten the economic security and the welfare of the tribe as a whole." [Emphasis added.] Those assertions are not only misleading and disingenuous, but also factually unsupported by the record.

A. Except For the One Vehicle Accident Itself, All Transactions at Issue Occurred Outside the Boundaries of the Blackfeet Reservation.

The undisputed facts in this case establish that:

(1) Respondents, members of the Blackfeet Indian Tribe, were injured in a one vehicle accident, involving respondent Crawford's 1968 Ford Bronco, on U.S. Highway 89, at a location within the exterior boundaries of the Blackfeet Reservation.

(2) Respondent Crawford had purchased the Ford Bronco from a used car dealer in Coram, Montana, located outside the boundaries of the Blackfeet Reservation.

(3) The person who had previously owned and traded the Bronco to the used car dealer and who had purchased and installed on the Bronco the master cylinder rebuild kit at issue did so outside the boundaries of the Blackfeet Reservation. He was not a member of the Blackfeet Tribe.

(4) The master cylinder rebuild kit was purchased from a retail outlet in Columbia Falls, Montana, outside reservation boundaries, and was manufactured by Echlin, and distributed by Genuine Parts, both of whom are incorporated and have principal places of business outside Montana.

Indeed, respondents do not dispute the District Court's conclusion in its Memorandum and Order dated May 16, 1990, that "with the exception of the mishap itself, all transactions relating to the plaintiffs' causes of action

occurred outside the boundaries of the Blackfeet Indian Reservation."

B. The Record is Devoid of Evidence From Which Respondents Could Legitimately Assert That Genuine Parts and Echlin Engaged in Any Commercial Dealing or Other Consensual Arrangement With the Blackfeet Tribe or Its Members.

Respondents are apparently concerned that, as petitioners have argued, comity is not a sufficient basis for requiring exhaustion of tribal remedies where, as here, Genuine Parts and Echlin engaged neither in commercial dealings or other consensual arrangements with the tribe or its members nor in conduct threatening or directly affecting the political integrity, economic security, or health or welfare of the tribe as a whole. This concern has prompted respondents to stretch far beyond the record in an effort to suggest, for the first time, that Genuine Parts and Echlin have engaged in some form of commercial dealing with the Blackfeet Tribe or its members.

Contrary to respondents' disingenuous assertions, the record is devoid of evidence suggesting that Genuine Parts or Echlin advertised or sold their master cylinder rebuild kit or any other automotive part on or throughout the Blackfeet Reservation. There is absolutely nothing in the record to suggest that Genuine Parts or Echlin entered the reservation, conducted business with the tribe, engaged in any commercial dealing or other consensual arrangement with the tribe or its members, or engaged in conduct which threatened or had any direct effect on the political

integrity, the economic security, or the health or welfare of the tribe as a whole.[1]

C. Respondents' Attempt to Equate NAPA Products with Genuine Parts or Echlin's Products Is Equally Misleading.

In asserting that Genuine Parts and Echlin placed NAPA products into the stream of commerce, and that NAPA products are advertised, sold, and used throughout the United States and the Blackfeet Reservation, respondents erroneously and disingenuously attempt to equate NAPA with Genuine Parts and Echlin, or NAPA products with products distributed by Genuine Parts or manufactured by Echlin. Respondents are well aware that NAPA and Genuine Parts and Echlin are not the same. In fact, when respondents first filed their complaints in Montana State Court, they erroneously named NAPA as party defendant and later stipulated to substituting Genuine Parts as the properly named defendant.[2] See Appendix A.

Further, from answers to interrogatories, respondents were well aware of the distinctions existing between NAPA, Genuine Parts, and Echlin. See Genuine Parts'

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[1]Indeed, there is nothing in the record establishing even that NAPA products are sold on or throughout the reservation.

[2]NAPA stands for National Automotive Parts Association. In their original complaint, respondents incorrectly named NAPA as "NAPA Automotive Parts & Accessories."

supplemental answer to Interrogatory No. 84 set forth verbatim in Appendix B.

In 1982, National Automotive Parts Association (NAPA), was a nonprofit Michigan corporation headquartered in Chicago, Illinois, and functioning as a trade association. NAPA consisted of seven members, one of whom was Genuine Parts, and all of whom were owners of various automotive parts distribution centers located throughout the United States. The seven members of NAPA were all separate and distinct corporations or entities, with no common control or ownership. See Appendix B.

As members of NAPA, all seven entities were licensed by NAPA to use the tradename "NAPA" in identifying the distribution centers they owned. In addition, NAPA licensed approximately 75 product manufacturers and suppliers, one of whom was Echlin, to use the tradename "NAPA" to identify the products which they shipped to member NAPA distribution centers. Finally, NAPA authorized "NAPA jobbers" -- various independently owned part stores or businesses which elected to purchase their products from a member NAPA company -- to identify their individual stores or businesses with the "NAPA" sign. See Appendix B.

Thus, even assuming, although there is nothing in the record establishing, that nationally advertised products bearing the "NAPA" tradename were sold on the Blackfeet Reservation, respondents have no basis to assert that such products were products distributed or manufactured by Genuine Parts or Echlin. The master cylinder rebuild kit

involved in this case was supplied by Echlin to Genuine Parts in Spokane, Washington, and from Genuine Parts' Spokane distribution center to Courtesy Motor Supply (a NAPA jobber) in Columbia Falls, Montana, outside reservation boundaries. See Appendix B. There is nothing in the record supporting an assertion that either Genuine Parts or Echlin has sold NAPA products on or throughout the reservation.

CONCLUSION

Respondents' assertions in their Brief in Opposition, that Genuine Parts Co. and Echlin, Inc. have advertised and sold NAPA replacement parts throughout the Blackfeet Reservation is disingenuous, misleading and factually unsupported by the record. Petitioners respectfully submit that respondents' misstatements of fact in this regard should not be considered and should have no bearing on the Court's decision whether to grant the Petition for Writ of Certiorari. For all the reasons set forth in the Petition for Writ of Certiorari, petitioners respectfully pray that a

Writ of Certiorari be issued to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 3rd day of February, 1992.

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APPENDIX A

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

JESS WESLEY CRAWFORD,

PLAINTIFF,

v.

STEVE HOOPER, d/b/a MIDAS MUFFLER SHOPS; MIDAS INTERNATIONAL CORPORATION; CHARLIE WALDROP, d/b/a CHARLIE'S PLACE; NAPA AUTOMOTIVE PARTS & ACCESSORIES; ECHLIN, INC., FORMERLY KNOWN AS ECHLIN MANUFACTURING COMPANY; AND THE STATE OF MONTANA,

DEFENDANTS.

STIPULATION FILE NO. ADV-84-855

COME NOW, the plaintiff, by and through his counsel of record, and the undersigned attorney on behalf of NAPA AUTOMOTIVE PARTS & ACCESSORIES and stipulate and agree as follows:

The true and correct name for the defendant above named as NAPA AUTOMOTIVE PARTS & ACCESSORIES is GENUINE PARTS COMPANY, INC.

The parties hereby agree that the name GENUINE PARTS COMPANY, INC., shall be hereafter used in this litigation to refer to NAPA AUTOMOTIVE PARTS & ACCESSORIES.

DATED this 4 day of September, 1984.

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Attorneys for Defendant GENUINE PARTS

By: /s/
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By: /s/ Tom Marra

APPENDIX B

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF CASCADE

JESS WESLEY CRAWFORD,

PLAINTIFF,

v.

HOOPER ENTERPRISES, INC., ET AL,

DEFENDANTS.

GENUINE PARTS COMPANY'S SUPPLEMENTAL INTERROGATORY ANSWER FILE NO. ADV-84-855

COMES NOW, GENUINE PARTS COMPANY and supplements its answers to interrogatories posed by plaintiff as follows:

* * *

INTERROGATORY NO. 84: Please state what type of business, financial, etc., relationship exists between NAPA AUTOMOTIVE PARTS & ACCESSORIES and ECHLIN, INC., formerly ECHLIN MANUFACTURING COMPANY. If you will do so without a motion to produce, please provide all documents reflecting the

business relationship between the two above-named defendants.

SUPPLEMENTAL ANSWER: NAPA AUTOMOTIVE PARTS & ACCESSORIES does not exist. In 1982, there was an entity called the National Automotive Parts Association (NAPA), which was a nonprofit Michigan corporation headquartered in Chicago, Illinois. NAPA functioned as a trade association whose members were the owners of various automotive parts distribution centers located throughout the United States. In 1982, the members of NAPA were:

(a) Genuine Parts Company, a Georgia corporation headquartered in Atlanta, Georgia, and the owner of 40 distribution centers:

(b) General Automotive Parts Corporation, an Indiana corporation headquartered in Dallas, Texas, and the owner of 15 automotive parts distribution centers;

(c) NAPA - Hawaii, (type of entity unknown), the owner of one distribution center in Waipahu, Hawaii;

(d) Quaker City Motor Parts Co., a corporation headquartered in Middletown, Delaware, and the owner of 6 distribution centers;

(e) Standard Unit Parts Corporation, an Illinois corporation headquartered in Normal, Illinois, and the owner of 3 distribution centers;

(f) Wilmar, Inc., a corporation headquartered in Pittsburgh, Pennsylvania, and the owner of 3 distribution centers; and

(g) Brittain Brothers, a corporation headquartered in Oklahoma City, Oklahoma, and the owner of 2 distribution centers.

These corporations or entities were all separate and distinct with no common control or ownership.

In 1982, as members of NAPA, all seven entities were licensed by NAPA to use the tradename "NAPA" in conjunction with the distribution of automotive replacement parts. Therefore, all distribution centers owned by these seven entities listed were identified as NAPA distribution centers. In addition, NAPA served as a point of contact between the seven member entities and the product manufacturers and suppliers, which number approximately 75, which furnish automotive replacement parts and supplies to NAPA distribution centers. Once it has been determined that a product will be marketed through the member NAPA distribution centers, then NAPA itself can license that particular supplier to use the tradename "NAPA" to identify the products which are shipped to member NAPA distribution centers. ECHLIN is such a supplier. ECHLIN has been licensed by NAPA to use the tradename "NAPA" on the products ECHLIN manufactures or suppleis [sic] to NAPA member organizations.

The chain of distribution for an ECHLIN product would be ECHLIN to GENUINE PARTS COMPANY at

one of its distribution centers and from GENUINE PARTS COMPANY to what we refer to as NAPA jobbing stores. NAPA jobbing stores are independently owned parts stores or businesses who, because they elect to purchase their products from a member NAPA company, are authorized to identify their individual parts stores with the "NAPA" sign. Therefore, we refer to these customers as NAPA jobbers.

With regard to the master cylinder involved in this case, it is our understanding that the product was supplied by ECHLIN to GENUINE PARTS COMPANY in Spokane, Washington, and from our Spokane distribution center to our customer, Courtesy Motor Supply (a NAPA jobber) in Columbia Falls, Montana. As you can see in the above scenario, the National Automotive Parts Association ("NAPA") was not involved in the chain of distribution at all.

GENUINE PARTS COMPANY is a customer of ECHLIN. There is no relationship whatsoever between ECHLIN and GENUINE other than ECHLIN is a supplier of automotive products to GENUINE PARTS COMPANY. In the same sense, GENUINE is a distributor of ECHLIN products identified with the "NAPA" logo to wholesale customers of GENUINE. It is certainly possibly that

ECHLIN distributes parts which are not identified with the NAPA logo through other distributors.

DATED this 3rd day of September, 1984.

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